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P.O. BOX 1450  
ALEXANDRIA, VA 22313-1450  
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DIRECTOR OFFICE  
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DECISION ON PETITION

MERCHANT & GOULD PC  
P.O. BOX 2903  
MINNEAPOLIS MN 55402-0903

In re Application of  
Michael D. Goldstein, et al.  
Application No. 09/785,791  
Filed: February 16, 2001  
For: **OPTICAL DEVICE**

This is a decision on the Petition to Withdraw Holding of Abandonment filed November 8, 2004, pursuant to 37 C.F.R. § 1.181(a). No fee is required.

The application was held abandoned for failure to respond in a timely manner and effective manner to the final Office action mailed July 30, 2003. A Notice of Abandonment was mailed March 24, 2004.

Petitioner alleges to have timely filed a response to said final Office action, specifically that a Notice of Appeal was timely filed on October 22, 2003. As evidence thereof, petitioner includes a copy of a date-stamped post card receipt which itemized a transmittal sheet containing a certificate of mailing, Notice of Appeal, check in the amount of \$165.00 and the post-card itself, which is date-stamped as received in the Office on October 27, 2003.

A review of the file record reveals that the original copy of the transmittal letter (with certificate of mailing) and Notice of Appeal had been received and matched with the file. However, the file record does not reveal appellants' brief, any petition for extensions of time for filing said brief or the fee for appellant's brief.

MPEP §1206 Appeal Brief, states in part:...

TIME FOR FILING APPEAL BRIEF...

Although failure to file the brief within the permissible time will result in dismissal of the appeal, if any claims stand allowed, the application does not become abandoned by the dismissal, but is returned to the examiner for action on the allowed claims. See MPEP § 1215.04. If there are no allowed claims, the application is abandoned as of the date the brief was due. Claims which have been objected to as dependent from a rejected claim do not stand allowed. In a reexamination proceeding failure to file the brief will result in the issuance of the certificate under 37 CFR 1.570. [emphasis added]

Appellants have demonstrated, and the file record supports, the timely filing of a Notice of Appeal on October 22, 2003, with certificate of mailing. However, the mere filing of a Notice of Appeal by appellant, does not toll the time for submission of appellant's brief. Therefore, appellants maximum time period for filing their brief, including the two (2) months automatically extended to appellant from the date that the Notice of Appeal was received and appropriate petition for up to five (5) months extension of time, would have expired May 24, 2004 (May 22, 2004 was a Saturday and thus the time period would have been extended to the next business day, Monday, May 24, 2004).

The Office was premature in mailing the Notice of Abandonment on March 24, 2004. However, the file record does not reveal any evidence that appellant filed a petition for extension of time, appeal brief fee or an actual brief.

In accordance with MPEP §1206, failure by appellant to file a brief, results in the dismissal of the appeal. The file record reveals that all claims were rejected in the final Office action mailed July 30, 2003. Therefore, given that there were (1) no allowed claims upon the dismissal of the appeal, (2) no evidence of a petition for extension of time, (3) no record of the brief fee having been paid or (4) no evidence that appellants filed a brief, then the application is appropriately held abandoned. The date of abandonment was December 22, 2003.

Accordingly, the petition is **Denied**.

37 C.F.R § 1.181 Petition to the Director, states in part:...

(f) The mere filing of a petition will not stay any period for reply that may be running against the application, nor act as a stay of other proceedings. Any petition under this part not filed within two months of the mailing date of the action or notice from which relief is requested may be dismissed as untimely, except as otherwise provided. This two-month period is not extendable. [emphasis added]


MPEP §711.03(c) Petitions Relating to Abandonment, states in part:...

C. Treatment of Untimely Petition To Withdraw Holding of Abandonment 37 CFR 1.181(f) provides that, inter alia, except as otherwise provided, any petition not filed within 2 months from the action complained of may be dismissed as untimely. Therefore, any petition (under 37 CFR 1.181) to withdraw the holding of abandonment not filed within 2 months of the mail date of a notice of abandonment (the action complained of) may be dismissed as untimely. 37 CFR 1.181(f). [emphasis added]

The Notice of Abandonment in the subject application was mailed on March 24, 2004. The subject petition was not filed until November 8, 2004, over seven (7) months from the date of the action complained of. In accordance with 37 C.F.R. §1.181(f), applicants' petition is also untimely.

Applicants may wish to file a petition under 37 C.F.R. §1.137 to revive the application.

The application file is being returned to the file repository.

  
Dwayne Bost  
Special Program Examiner  
Technology Center 2600  
Communications